Supreme Court, U. S.
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No. 80-133

# In the Supreme Court of the United States

OCTOBER TERM, 1980

LEVITT & SONS OF PUERTO RICO, INC.,
PETITIONER,

*v.*

COMMERCIAL INSURANCE COMPANY,
RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner Levitt & sons of Puerto Rico, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on April 8, 1980, and a further order on Petition for Rehearing entered April 30, 1980.

### Question Presented

1. Whether the judgment rendered against the Petitioner, without a trial, or the receipt of any evidence, and based solely on the contested pleading of one of the parties violates the Due Process clause of the Fifth Amendment.

2. Whether the upholding of said judgment by the First Circuit warrants review by this court.

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## Opinion Below

The Opinion of the Court of Appeals of April 8, 1980 is unpublished. It appears in the Appendix at page 7. The Opinion of the District Court is unpublished. It appears in the Appendix at page 17.

## Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on April 8, 1980. A timely petition for rehearing was denied on April 30, 1980. (Appendix B at page 15). This petition for certiorari was filed within nine days of that day. This court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## Statement of the Case

This case is brought before this court for review because it involves a bizarre situation in which a court of the United States adjudicated the rights of the parties without a trial, or any sort of evidence whatsoever, solely upon the controverted pleadings of one party. Such action was upheld by the Court of Appeals, and it involves the kind of clear violation of constitutional rights as to call for this court's attention.

The federal jurisdiction in the court of first instance was pursuant to 28 U.S.C. § 1332.

This case arises out of a simple controversy between Levitt and Sons of Puerto Rico, Inc. and Commercial Insurance Companies as to whether a specific agreement had been reached between them during an in-chambers meeting at the District Court.*

The existence of the agreement was formally pleaded to the trial court by Commercial. (Appendix D, page 23).

Levitt answered this pleading and denied as "groundless" (Appendix E, page 25).

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*A summary of the factual background of the litigation has been prepared by this Counsel and included as Appendix G.

The District Court, without setting this controversy for trial, without receiving any evidence whatsoever, entered a judgment and found that as a matter of fact the parties had entered into what it called a "winner-take-all" agreement. As a result of said finding of fact, judgment was entered against Levitt for $34,000.00. (Appendix C, page 17).

## Proceedings in the Court of Appeals

The judgment was appealed to the United States Court of Appeals for the First Circuit. There, Levitt stressed in its briefs and through oral argument that the District court had erred in deciding the rights of the parties without a trial, a hearing, in short, without any evidence.

The Circuit Court, in an unpublished opinion, found that "there was solid basis" for the District Court's order that Levitt reimburse Commercial in the amount of $34,000.00 and upheld the judgment. (Appendix A, page 7).

Through a petition for re-hearing (Appendix F, page 27), Levitt pressed again to the Circuit Court that all the proceedings in which its rights had been adjudicated without the benefit of the hearing were contrary to the due process guarantee of the Fifth Amendment. The petition for re-hearing was denied. (Appendix B, page 15).

## Reasons for Granting the Writ

The courts below have reached a result that, even on the record, is so grotesque and so contrary to the principles of due process as to justify the supervisory intervention of this court.

In spite of the fact that the existence of the agreement was in controversy and no evidence of any kind was received or called for by the trial court when deciding the issue at bar, the Court of Appeals felt no compunction in upholding the District Court.

The complete disregard by the courts below of the right to an evidentiary hearing as to the matter in dispute demands review by this court.

## Argument

As in *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960), the ultimate question presented is whether the judgment rendered against petitioner was totally devoid of evidentiary support, as to render a decision unconstitutional under the due Process clause of the Fifth Amendment. The decision of this question turns not on the sufficiency of the evidence, but on whether the judgment rests upon any evidence at all.

Similar case law illustrative of this problem is not abundant, simply because the notion that all judgments as to contested facts must rest upon evidence is so deeply ingrained in the Anglo-American legal tradition that errors of this kind seldom arise.

When the egregiousness of the mistake was squarely brought to the attention of the Court of Appeals the issue was bypassed by that tribunal by not finding in the record Levitt's pleading which negated the factual allegations of Commercial (Appendix A, at page 14).

When Levitt, upon re-hearing, pointed out to the Circuit Court of Appeals that not only its pleadings had been included in the record, but had also been annexed as an appendix to its reply brief, the Court ended the matter by stating that: "In our opinion, we noted that Levitt's answer had not been included in the record, but also assumed that it denied the agreement. Our opinion did not turn on the absence of the answer to the counter claim, but was based on the substantive arguments advanced by both parties, the facts* and the law". (Appendix B, at pages 15, 16).

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*In the absence of any kind of evidentiary hearing as to the matter in dispute, we simply wonder where the Court of Appeals found those "facts" to uphold the judgment.

The Court of Appeals has negated the right of Levitt to a day in court. Under such circumstances the case should be reviewed and the judgment overruled.

## Conclusion

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit. The opinion should be vacated and the case be remanded to the trial court for a hearing as to the facts in controversy.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

# United States Court of Appeals
## For the First Circuit

No. 79-1481

JOSE BERRIOS RIVERA, ETC.,

PLAINTIFFS-APPELLEES,

*v.*

BRITISH ROPES LTD., ET ALS.,

DEFENDANTS-APPELLEES,

*v.*

HARNISCHFEGER CORPORATION,

DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLEE,

*v.*

LEVITT & SONS OF PUERTO RICO, INC.,

THIRD PARTY DEFENDANT-APPELLANT,

*v.*

COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,

ADDITIONAL THIRD PARTY DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[HON. JOSE V. TOLEDO, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

*David Rive-Rivera*, with whom *Calderon, Rosa-Silva & Vargas* was on brief, for appellant.
*Charles A. Cordero* for appellee.

April 8, 1980

BOWNES, *Circuit Judge*. This case, we hope, closes the book on a personal injury diversity action that started on June 12, 1973. In order to understand the issues, a little background and the lineup of the parties are necessary. Plaintiff, Berrios Rivera, was injured while working as a carpenter for Insular Construction Corporation at a housing development being built by Levitt & Sons of Puerto Rico, Inc. The wire rope of a crane that was pouring concrete broke and the crane bucket fell on Berrios rendering him completely and permanently paralyzed. Berrios' employer, Insular, carried workmen's compensation insurance with the Commercial Insurance Company of Newark, New Jersey, and it paid the benefits due under the Workmen's Compensation Act of Puerto Rico.

Berrios brought suit against the manufacturer of the wirerope, British Ropes Ltd., and Harnischfeger Corporation, the manufacturer of the crane. Harnischfeger brought a third party action against Levitt and Insular. Levitt then brought a third party complaint against Commercial; the basis of the complaint was a hold harmless agreement running fron Insular to Levitt, which Levitt alleged was covered by the insurance contract between Insular and Commercial. In its answer, Commercial denied there was any insurance coverage, alleged that Insular had voided the policy by failing to comply with its conditions and requirements, claimed statutory immunity from suit under the Puerto rico Workmen's Compensation Act because its insured was the employer of the plaintiff, and alleged that the hold harmless agreement was null and void under the common law of Puerto Rico, citing specifically the case of *Chico Ramos* v. *Editorial Ponce, Inc.*, 101 D.P.R. 759 (1973).

A settlement agreement was arrived at by all the parties under which each of the four defendants agreed to pay $34,000 to the plaintiff. Levitt and Commercial unsuccessfully challenged the settlement agreement in the district court and on appeal. *Berrios Rivera* v. *British Ropes Ltd.*, 575 F.2d 966 (1st Cir. 1978). Although joining together in their attack on

the settlement agreement, Levitt and Commercial were careful to reserve for future determination by the district court their claims against each other. *Id.* at 969.

The District Court of Puerto Rico, by opinion of June 28, 1979, held: that the hold harmless agreement was invalid under Puerto Rican law; that even assuming the validity of the hold harmless agreement, Commercial, as the employer's insurer, was immune from suit under the Workmen's Compensation Act of Puerto Rico; and that the reservation of claims agreement between Levitt and Commercial was "one of winner take all." Levitt was ordered to reimburse Commercial for all sums paid to Berrios plus interest from date of judgment and costs. This appeal followed. At issue are the three rulings of the district court.

For the resolution of the validity of Levitt's claim for reimbursement, we must look to Puerto Rican law. The usual deference that a circuit court gives to a district court's interpretation of its own state law is heightened in the case of Puerto Rico because of the knowledge and training that the judges of the District Court of Puerto Rico have in the Spanish language and system of law that is indigenous to the Commonwealth.[1] This deference, however, does not compel us to abdicate our review of state law questions nor accept without careful examination the district court's analysis of the cases decided by the Supreme Court of Puerto Rico.

We disagree with the district court that, even if the hold harmless clause is valid, Levitt's claim is barred because Commercial's insured, the contractor-employer, was immune from suit under the Workmen's Compensation Act. In our opinion, the hold harmless clause is the key to Levitt's claim; if it is applicable and valid, it can recover. This is not a case like *Orza Rentas Vda. de Costas* v. *Puerto Rico Olefins*, 78 J.T.S. 80 (1978) (translation supplied by appellant), relied on by the

[1] We must note that, since 1972, the decisions of the Supreme Court of Puerto Rico have not regularly been translated into English.

district court, where the contractor's injured employee sued the owner of the premises. The court held that payment of the workmen's compensation insurance by the contractor, the subcontractor, the principal, or the owner of the construction project immunized all the employers against damage suits by the employees. In the case at bar, there was no action by the employee against Levitt. Levitt was brought into the case as a third party defendant by the defendants whom the plaintiff had sued. The court in *Puerto Rico Olefins* carefully distinguished *Velez* v. *Halco Sales, Inc.*, 97 P.R.R. 426 (1969), which is very similar to the case before us. In *Halco Sales*, an employee of the contractor building an apartment house was injured when a winch failed to operate properly and he fell to the ground. The contractor had leased the winch and other equipment from Halco Sales. As part of the lease, the contractor agreed to keep the equipment in safe operating condition, assumed all responsibility for claims asserted by any person arising from the maintenance, use, or possession of the leased equipment, and agreed to hold Halco Sales harmless from any liability arising from such claims. When the injured employee sued Halco Sales, it brought an action against the contractor based on the hold harmless agreement in the lease. In arriving at its decision that Halco Sales could recover from the contractor-employer, the Supreme Court of Puerto Rico traced the history and purpose of the workmen's compensation law in the Commonwealth and reviewed the pertinent cases. In the course of its decision, it stated:

> If an employer, knowing the state of the law and the immunity which protects him, in his freedom of contract decides to assume an obligation regarding third persons who might be guilty of the accident, this in no way affects the public policy nor the integrated system of compensation to workmen, provided, as far as the worker and the Fund are concerned, that the provisions of the law, which cannot be modified or altered contractually, be complied with.

97 P.R.R. at 434. We think this reasoning applies here; immunization from suit under the Act does not also immunize an employer from a voluntary and valid hold harmless agreement. Therefore, this case turns on the interpretation and validity of the hold harmless agreement which was not at issue in *Halco Sales*.

The contract between Levitt and Insular provided in pertinent part:

> 13. *Contractor's Liability for Damages.*
>
> The Contractor assumes and shall hold the owner harmless from any liability, loss, or expense incurred because of his operations hereunder, or any act or omission by him, his employees, agents or associates in connection with or during such operations, including, but without limitation to, any liability, loss, or expense incurred by reason of injury, death, or damages to or of persons or property.

The district court found this clause to be null and void because it was vague and ambiguous. We construe it as holding Levitt harmless from acts or omissions of Insular (contractor-employer), its agents, servants and employees. By obtaining workmen's compensation insurance through Commercial, Insular immunized Levitt from suits against it by Insular's employees. *Puerto Rico Olefins, supra*. Insular, therefore, had complied with the hold harmless agreement. To construe the clause, as Levitt urges, to cover the acts or omissions of Levitt and its servants, agents and employees, gives it a meaning at odds with reason and common practice. We agree with the district court that, if the clause br construed to hold Levitt harmless from the consequences of its own acts or omissions, it is rendered nugatory by the holding of the Supreme Court of Puerto Rico in *Chico Ramos* v. *Editorial Ponce, Inc.*, 101 D.P.R. 759 (1973) (translation supplied by appellee):

> Exculpatory clauses are not encouraged. In the past, we have rejected the contractual clauses to exculpate

a priori one of the parties to a contract for the damages subsequently caused to the other contracting party for negligent acts of the first. *Carrasquillo* v. *Am. Missionary Association*, 61 P.R.R. 837 (1943); *Cabrera* v. *Doval*, 76 P.R.R. 728 (1954); see *Rivera* v. *San Juan Racing*, 90 P.R.R. 405 (1964) and also, *Castro* v. *Supermercado de Descuentos*, 90 P.R.R. 826 (1971).

The Civil Code acknowledges the liberty of contract, but sets forth that the will of the contracting parties shall not be at variance with the laws, the morals, or the public order. Article 1207 of the Civil Code, 31 L.P.R.A. § 3372. Article 4 of the same 31 L.P.R.A. § 4, provides that the rights granted by the laws may be waived, provided that said waiver is not contrary to law, to the public interest, or the public order, or prejudicial to the interests of a third party.

The waiver of rights set forth by art. 4 of the Code shall be clear, conclusive, and unequivocal. Even more so when dealing with agreements exculpating a person from liability for its future negligent acts. *Cabrera* v. *Doval*, *supra* at p. 731. We held there—upon reversing the judgment dismissing the complaint for damages rendered on the grounds of a priori release from liability—that:

> It is a universally accepted rule that agreements exempting from liability for negligence are not favored by the law; [citations] and should therefore be strictly construed against the party relying on them to avoid liability, and, if possible, their interpretation should be against exemption. [citations] Clear and explicit language is required in the contract to absolve a person from the consequences of his own neglect. [citations] Some courts maintain, in our opinion with reason, that the language exculpating from liability for negligence should be explicit, either expressly referring to negligence or indicating the intention in unequivocal terms. [citations].

> See, *Contractual Exculpation from Tort Liability in California—The True Rule Steps Forward*, 52 Calif. L. Rev. 350 (1964); 57 Am. Jur.2d, *Negligence*, § 28, pp. 372-373. An important factor for determining the validity of an exculpatory clause depends on the bargaining power of each one of the contracting parties. If they are not on the same footing and power, so that a party is under the obligation to accept the exculpation from liability for negligence of the other party, the clause is null. *Delta Airlines, Inc.* v. *Douglas Aircraft Company*, 47 Cal. Rptr. 518 (1966); *Henningsen* v. *Bloomfield Motors, Inc.*, 161 A.2d 69 (1960); *Donna* v. *Con Edison*, 337 N.Y.S.2d 722 (1972); *Kansas City Power & Light Co.* v. *United Tel. Co. of Kansas*, 458 F.2d 177 (1972).

Since the hold harmless agreement was either inapplicable or invalid, *Halco Sales* does not apply and Levitt's claim against Commercial must fail.

The final matter is Levitt's assertion that, since it had sued Commercial and no counterclaim was brought againt it, Commercial cannot recover anything from it; that it is out-of-pocket $34,000, but has no obligation to reimburse Commercial for its share of the settlement. Based upon the record before us, we cannot say that the district court was clearly erroneous in finding that the parties had agreed to a "winner take all" disposition of their dispute. In arriving at its decision, the district court pointed to part of the settlement order of the court of March 29, 1967:

> Levitt and Sons of Puerto Rico, Inc., and Commercial Insurance Company of Newark, New Jersey agreed to submit for adjudication their claims against each other to this Court by briefs.

The phrase "claims against each other" means that the adjudication agreement was a two-way street, not one-way dead-end, as appellants claim. Moreover, if Commercial's pleadings had been technically defective, they did bring a

"counter complaint" on September 15, 1978, alleging that the agreement between the parties was that the prevailing party would recover $34,000 plus interest from the other. Levitt's answer to this counterclaim has not been included in the record, but we assume that it denied such agreement.

There was a solid basis for the district court's order that Levitt reimburse Commercial in the amout of $34,000 plus interest from the date of judgment.

Affirmed except as to costs.

No costs to either party.

We are not allowing costs because Commercial asserted in its counterclaim that the reservation agreement provided "that neither party would seek attorney's fees or costs from the other." Commercial is bound by its version of the terms of the agreement. For this reason, the costs allowed by the district court are disallowed.

APPENDIX B

# United States Court of Appeals
## For the First Circuit

No. 79-1481

JOSE BERRIOS RIVERA, ETC.,
PLAINTIFFS-APPELLEES,
*v.*
BRITISH ROPES LTD., ET ALS.,
DEFENDANTS-APPELLEES,
*v.*
HARNISCHFEGER CORPORATION,
DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLEE,
*v.*
LEVITT & SONS OF PUERTO RICO, INC.,
THIRD PARTY DEFENDANT-APPELLANT,
*v.*
COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,
ADDITIONAL THIRD PARTY DEFENDANT-APPELLEE.

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

ORDER OF COURT
Entered: April 30, 1980

The petition for rehearing is denied. In our opinion, we noted that Levitt's answer had not been included in the record, but also assumed that it denied the agreement. Our

opinion did not turn on the absence of the answer to the counterclaim, but was based on the substantive arguments advanced by both parties, the facts and the law. The petition for rehearing does not add anything new or different.

By the Court:
/s/ DANA H. GALLUP
*Clerk.*

*[cc: Messrs. Rive Rivera and Cordero.]*

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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CIVIL NO. 528-73

JOSE BERRIOS RIVERA, ET AL.,
PLAINTIFFS,
*v.*
BRITISH ROPES LTD., ET AL.,
DEFENDANTS,
*v.*
HARNISCHFEGER CORPORATION,
DEFENDANT AND THIRD PARTY PLAINTIFF,
*v.*
LEVITT & SONS OF PUERTO RICO, INC.,
THIRD PARTY DEFENDANT,
*v.*
COMMERCIAL INSURANCE COMPANY
OF NEWARK, NEW JERSEY,
ADDITIONAL THIRD PARTY DEFENDANT.

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### OPINION AND ORDER

The matter presently before the court involves the aftermath of a settlement of plaintiff's claim, and the disbursement between the defendants, (hereinafter "British Ropes" and "Harnischfeger") and the third party defendant (hereinafter called "Levitt") and the additional third party defendant (hereinafter called "Commercial"). All of the aforesaid defendants effectuated a settlement, and thereafter Levitt and Commercial filed an appeal contesting the settlement. The Appellate Court affirmed the settlement, *Berrios Rivera* v. *British Ropes, Ltd.*, 575 F.2d 966 (1st Cir., 1978). The details of said settlement are summarized in the Appellate Court's decision and need not be repeated here.

Pursuant to the terms of the aforesaid settlement, British Ropes and Harnischfeger paid their respective sums and stipulated that upon payment all disputes against, and between themselves, would terminate. Conversely, Levitt and Commercial stipulated the dispute between them would continue to determine their liability and they would file the corresponding Motion to Dismiss and Motion for Summary Judgment.[1]

The parties have now filed their respective motions, memorandums of law and reply briefs and the court now rules upon the same.

Levitt has filed a Motion for Summary Judgment claiming there is no genuine issue of fact and that judgment must issue in its favor. Indeed, it is undisputed that at the time of the accident, plaintiff Jose Berrios Rivers was employed by Insular Construction Company,[2] (hereinafter called "Insular"), who at that time was insured by its liability carrier, Commercial.[3] Plaintiff suffered an on-the-job accident which was covered by the State Workmen's Compensation Insurance Fund, pursuant to the provisions of law, 11 L.P.R.A. 1, *et seq*. Plaintiff sued

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[1]The settlement, among other matters, compelled a payment to plaintiff of $34,000.00 by Levitt, and a payment of $34,000.00 by Commercial. Obviously, if there is no cause of action against Commercial, or if Commercial is not otherwise liable for any payment, then, Levitt would be compelled to reimburse Commercial the $34,000.00. The record also reflects a clear inference that the agreement between Levitt and Commercial was one of "winner take all", i.e., if Levitt's position were upheld Commercial would reimburse Levitt the $34,000.00, otherwise Levitt would reimburse Commercial $34,000.00. See page 2 of Order of Judge Watson dated March 29, 1977, and page 6 of our Order dated May 31, 1977.

[2]Insular Construction Company is not a party to this action, and has never been before this Court.

[3]It is also undisputed that Levitt was the owner of the project and under the terms of the contract, Insular was required to secure State Workmen's Compensation coverage. Hence, Levitt is a "statutory " employer of plaintiff pursuant to the holding of *Lugo Sanchez* v. *A.F.F.*, (1977) 105 D.P.R. 861, 105 P.R.R. __, while Insular is the "real" employer of plaintiff.

British Ropes and Harnischfeger claiming negligence; a third party action was filed against Levitt, pleadings Levitt's negligence was the proximate cause of the accident. Levitt brought Commercial into this action by way of an additional third party complaint claiming it had a contract with Insular, which contract contained a hold harmless clause in favor of Levitt, and that pursuant thereto Commercial was liable for claims caused by the operations of Insular. Thereafter, Commercial's counter claimed against Levitt for reimbursement of the settlement sums it paid.

Conversely, Commercial filed a Counter Motion for Dismissal claiming that under the applicable law the hold harmless agreement was null and void and that in either event Commercial's insured had employer's immunity pursuant to the specific provision of 11 L.P.R.A., Section 21 and the subsequent interpretation thereof by the Court of Puerto Rico. Furthermore, Commercial argued that since no cause of action against Commercial's insured was available to Levitt, then Levitt's claim against Commercial was likewise non-existent.

In short, this Court is called upon to determine the validity of the hold harmless clause in the contract between Levitt and Commercial's insured, and whether Levitt has a valid action against Commercial.

### The Hold Harmless Clause

We must view the validity of the hold harmless clause with the holding of the Supreme Court of Puerto Rico in *Chico Ramos* v. *Editorial Ponce, Inc.*, 101 D.P.R. 759; 101 P.R.R. __, which clearly stated that in this jurisdiction hold harmless clauses are not favored, and that hold harmless clauses must be clear and specific in its language. Furthermore, if a hold harmless clause is overly broad and too engulfing, the Court should void the same as being contrary to public policy. The holding in *Chico Ramos* is essentially the same doctrine followed in the case of *Smith* v. *Chevron Oil Co.*, 517 F.2d 1154 (5th Cir., 1975), which interpreted Louisiana's Civil Code, which contains provisions similar to the Puerto Rico Civil Code.

With that preamble we look at the wording of the disputed clause which reads

> "13. *Contractor's Liability for Damages.*
>
> The contractor assumes and shall hold the owner harmless from any liability, loss or expense incurred because of his operations hereunder, or any act or omission by him, his employees, agents or associates in connection with or during such operations, including, but without limitation to, any liability, loss, or expense incurred by reason of injury, death or damages to or of persons or property."

We find the above clause to be vague. It is not clear if the pronouns *his*, or *him* refer to the employees of Levitt, or to the employees of the sub-contractor (Commercial's insured). If the word *his* and *him* refer to the entire operations of Levitt, then the entire clause is null and void since it is against public interest to, *a priori*, release a principal for his torts, *Chico Ramos*, supra. If the pronoun *his* or *him* refer to the employees of the sub-contractor (Commercial's insured) then all that the sub-contractor has agreed to do is comply with local law and assume liability for its negligence and the negligence of its employees.

In sum, we find that the hold harmless clause is vague and ambiguous, or is otherwise null and void because it attempts to exonerate through indemnity, *a priori*, Levitt for the damages that may be caused by Levitt.[4]

---

[4] Levitt also claims Insular failed to comply with the terms of the contract by not securing insurance for the protection of the "owner" (Levitt), and that Commercial incorporated the hold harmless into its insurance policy. Insular's alleged failure to secure an insurance policy may constitute a breach of contract, but such breach is not covered under Commercial's liability policy, nor does the complaint filed by Levitt make such allegation. Therefore, that issue is not before this Court, and we make no inference as to the validity, if any, of such a claim by Levitt directly against Insular.

THE CLAIM AGAINST COMMERCIAL

Even assuming the validity of the hold harmless clause, Levitt's claim against Commercial cannot be sustained. To begin with, there is no basis for this Court to assume that because Commercial's insured subscribed to the aforesaid hold harmless clause, it thereby waived its right to employer's immunity for work related employee claims as provided in 11 L.P.R.A., Section 21. Levitt cites, in support of its position, the case of *Velez* v. *Halco Sales, Inc.*, 97 D.P.R. 438; 97 P.R.R. 426. At the outset, we note that *Halco Sales, Inc.* was decided long before *Chico Ramos*, and involved a lease agreement between a lessor of scaffolding equipment (Halco Sales) and the third party defendant employer of the injured employee. The suit was filed as a subrogation action by the State Insurance Fund Commissioner against Halco Sales. The validity of the hold harmless was never raised in Halco Sales and therefore that issue was never before the Court. Furthermore, the dispute in Halco Sales did not involve a controversy between a "statutory" employer and the "real" employer as does this case.

Prior to *Halco Sales*, the Supreme Court of Puerto Rico had steadfastly held that the employer had absolute immunity from work related employee claims, whether they were direct actions, or indirect third party actions; *Marcano Torres* v. *Fuentes Fluviales*, 91 D.P.R. 655, 91 P.R.R. (1965); *Cortijo Walker* v. *Fuentes Fluviales*, 91 D.P.R. 170, 91 P.R.R. (1966); *Halco Sales*, therefore, seemed to be a departure from the doctrine of absolute employer immunity and held that a third party can demand indemnity from the employer when there was valid hold harmless clause in a contract. This departure, however, is very limited in scope. Shortly after *Halco Sales*, the Supreme Court of Puerto Rico announced *Chicos Ramos* that hold harmless clauses were to be viewed with disfavor. More recently, the Supreme Court of Puerto Rico, in a case identical to the one at bar, reiterated its doctrine that

the employer has absolute immunity from employee work related claims, and that a hold harmless clause between the statutory employer and the real employer did not constitute a waiver of the employer's immunity;,see *Orza Rentas Vda. de Costas* v. *P.R. Olefins*, 78 J.T.S. 80 (October 20, 1978).

Thus, the Supreme Court of Puerto Rico has distinguished and clarified that a valid hold harmless agreement can be enforced against an employer if the recipient of the hold harmless agreement is neither the "real" employer nor the "statutory" employer.[5] Since it is undisputed Levitt is a statutory employer, it has no cause of action against Commercial's insured, who is the "real" employer.

Since Levitt has no cause of action against Insular, it also lacks a cause of action against Insular's liability insurer, Commercial; *Alonso Garcia* v. *Flores Hermanos Cement Products, Inc.*, Supreme Court of Puerto Rico, October 24, 1978, 78 J.T.S. 91; *Ruiz Rodriguez* v. *Litton Industries*, 428 F. Supp. 1232 (D.P.R., 1977), aff'd 574 F.2d 44 (1st Cir., 1978).

WHEREFORE, in view of the foregoing, it is hereby,

ORDERED, that the Motion for Summary Judgment filed by Levitt be and is hereby DENIED, and it is further;

ORDERED, that the Motion to Dismiss filed by Commercial be and is hereby GRANTED, and it is further;

ORDERED, that Levitt shall reimburse Commercial all sums paid by it to plaintiff, plus interest at the legal rate from the date of entry of this judgment, plus all recoverable costs, and it is further,

ORDERED that the Clerk shall enter judgment in accordance with this Opinion and Order. IT IS SO ORDERED.

San Juan, Puerto Rico, June 28, 1979.

/s/ JOSE V. TOLEDO
JOSE V. TOLEDO
Chief, U.S. District Judge

[5] As would be the case of a non-employee claim.

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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Civil No. 548-73

JOSE BERRIOS RIVERA, ET AL.,
PLAINTIFFS,
*v.*
BRITISH ROPES, LTD., ET AL.,
DEFENDANTS,
*v.*
HARNISCHFEGER CORPORATION,
DEFENDANT AND THIRD PARTY PLAINTIFF,
*v.*
LEVITT & SONS OF PUERTO RICO, INC.,
THIRD PARTY DEFENDANT,
*v.*
COMMERCIAL INSURANCE CO.
OF NEWARK, NEW JERSEY,
ADDITIONAL THIRD PARTY DEFENDANT.

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### COUNTER COMPLAINT AGAINST LEVITT & SONS OF PUERTO RICO

TO THE HONORABLE COURT:

COME NOW, defendant Commercial Insurance Company of Newark, New Jersey (Commercial) and respectfully sets forth and prays:

1. That Levitt has filed a third party action against Commercial.

2. That defendants to this case, to wit, British Ropes, Ltd., et al; Harnischfeger Corporation; Levitt & Sons of Puerto Rico, Inc.; and Commercial Insurance Company were adjudged to have effected a settlement of this case by this Honorable Court, and said Judgment was affirmed by the First Circuit Court of Appeals.

3. That the above mentioned settlement was to the effect that all defendants to this case would contribute certain specified amounts, and pursuant to said settlement Levitt contributed $34,000.00 and Commercial contributed $34,000.00.

4. That as part of the settlement it was accorded that the dispute between Levitt and Commercial would continue.

5. That as part of the settlement Levitt and Commercial agreed:

(a) that if Levitt was successful in its third party action against Commercial, then Commercial would reimburse Levitt the aforesaid sum of $34,000.00 plus interest that it paid;

(b) that if Commercial was successful in its defense against the claim of Levitt, then Levitt would reimburse Commercial for the aforesaid sum of $34,000.00 plus interest that it paid;

(c) that neither party would seek attorney fees or costs from the other.

6. That the aforesaid understanding was held in chambers before Honorable James T. Watson.

WHEREFORE, it is respectfully prayed that this Honorable Court deny the third party action filed by Levitt, and grant this counter complaint against Levitt, and order Levitt to reimburse Commercial the sum of $34,000.00 plus interest that it paid to plaintiff.

In San Juan, Puerto Rico, this 15 day of September of 1978.

I CERTIFY that I have sent copy of this motion to attorney Ramon Vargas, P.O. Box 2219, Hato Rey, Puerto Rico 00919.

Respectfully submitted,

(s) CHARLES A. CORDERO
CHARLES A. CORDERO
P.O. Box 9213
Santurce, Puerto Rico 00908
Tel: 724-5554

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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Civil No. 528-73

JOSE BERRIOS RIVERA
PLAINTIFFS,
*v.*
BRITISH ROPES, LTD., ETC.,
DEFENDANTS,
*v.*
HARNISCHFEGER CORPORATION,
DEFENDANT AND THIRD PARTY PLAINTIFF,
*v.*
LEVITT & SONS OF PUERTO RICO, INC.,
THIRD PARTY DEFENDANT,
*v.*
COMMERCIAL INSURANCE CO.
OF NEWARK, NEW JERSEY,
ADDITIONAL THIRD PARTY DEFENDANT.

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### ANSWER TO COUNTER COMPLAINT

TO THE HONORABLE COURT:

Levitt & Sons of Puerto Rico, Inc. admits paragraphs 1, 2, 3 and 4, but denies all other paragraphs of the Counter Complaint filed by Commercial Insurance Company.

It affirmatively alleges that said Counter Complaint is completely groundless.

WHEREFORE, it is respectfully requested that the Counter Complaint be dismissed.

At San Juan, Puerto Rico; this 14th day of December, 1978.

I hereby CERTIFY that on this same date I have sent copy of the foregoing document to Charles A. Cordero,Esq.,

Box 9213, Santurce, Puerto Rico 00908; Gabriel Hernandez Rivera, Esq., Box 2552, San Juan, Puerto Rico 00903; Jaime Pieras, Jr., Esq., Box 507, Hato Rey, Puerto Rico 00919; Amancio Arias Cestero, Esq., Box 2629, San Juan, Puerto Rico 00903.

CALDERON, ROSA SILVA & VARGAS
Box 2219
Hato Rey, Puerto Rico 00919
Tel. 753-5050
(s) RAMON HUMBERTO VARGAS
RAMON HUMBERTO VARGAS

mtr

APPENDIX F

# United States Court of Appeals

## For the First Circuit

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No. 79-1481

JOSE BERRIOS RIVERA, ETC.,

PLAINTIFFS, APPELLEES,

*v.*

BRITISH ROPES, LTD., ET ALS.,

DEFENDANTS, APPELLEES,

*v.*

HARNISCHFEGER CORPORATION,

DEFENDANT AND THIRD PARTY PLAINTIFF, APPELLEE,

*v.*

LEVITT & SONS, OF PUERTO RICO, INC.,

THIRD PARTY DEFENDANT, APPELLANT,

*v.*

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,

ADDITIONAL THIRD PARTY DEFENDANT, APPELLEE.

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ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

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## PETITION FOR REHEARING

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To the Honorable Court:

### INTRODUCTORY STATEMENT

This petition for re-hearing is filed because the judgment entered by this Court rests in the supposed absence from

the record of the most important pleading of Levitt. Its presence, and consequent consideration by this court would have mandated, as a matter of due process of law, the reversal of the judgment of the District Court. Due to the nature of this problem, it was impossible to foresee that the court would not take into consideration that pleading.

## ARGUMENT

This appeal involves two issues: First, whether the hold-harmless in favor of Levitt was invalid according to the law of Puerto Rico. Second, whether in fact, the "parties had agreed to a 'winner take all' disposition of their disputes" as alleged by Commercial. The controversy as to the last issue was framed through formal pleadings. Commercial, through its counter-complaint of September 15, 1978, specifically alleged that an agreement has been reached between the parties that the prevailing party would recover $34,000.00 plus interests from the other.

Levitt filed its answer to that counter-complaint where it denied the existence of said agreement, or "understanding".

No evidence was ever received, or requested, by the trial court when reaching its judgment in favor of Commercial as to this point. This Honorable Court, when reviewing the District Court's judgment, did not find in the record "Levitt's answer to this counter-complaint" and consequently felt that there was "solid basis" to support the appealed judgment.

On the contrary, there is nothing in the record besides the contradictory pleadings of both parties to enable the court to decide the controversy as to whether in fact that specific agreement had been reached.*

* Commercial specifically alleged that said "understanding was held in chambers before Honorable James T. Watson". (Paragraph 6 of the Counter-Complaint of Commercial). However, Commercial in this same suit represented to this court: "That

We have reviewed the record forwarded by the District Court on September 13, 1979, and it appears from the index certified by the Clerk that the answer of Levitt & Sons of Puerto Rico, Inc. to the counter-complaint of Commercial was forwarded to this Court as document No. 212 of the record on appeal. Furthermore, Levitt & Sons included its answer to the counter-complaint as Appendix D of the Reply Brief. Reference was made throughout the Reply Brief for the Appellant to that answer. Reference was also made, during oral argument, to said answer to the counter-complaint.

Levitt's answer to the counter-complaint of Commercial is decisive for this appeal inasmuch as due process requires that the factual allegations of Commercial against Levitt not be decided without evidence of some kind at a trial, or through a Summary Judgment proceeding. The proposition that the Due Process guarantee of the Fifth Amendment requires evidence before a court of the United States can enter any judgment, civil or criminal, requires no citation of authority.

WHEREFORE, it is respectfully requested that rehearing be granted and the judgment of the District Court be reversed.

Respectfully submitted,

DAVID RIVE-RIVERA
CALDERON, ROSA-SILVA & VARGAS
BOX 2219
Hato Rey, Puerto Rico 00919
Tel. 753-5050
*Attorneys for Appellant*

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Commercial's attorney was not present at the Second settlement conference, held on February 18, 1977, when the alleged settlement was reached . . .", *Berrios Rivera* v. *Britsh Ropes Ltd.*, 575 F. 2nd. 966, 968 (1st Cir. 1978), that is, at the very same conference where the "winner-take-all" agreement was reached. Thus, if anything, the published precedent of this case stands in direct contradiction to Commercial's allegation.

## APPENDIX G

*Factual Background*

The original plaintiff, Berrios Rivera, was injured when working as a carpenter for his employer Insular Construction Corp., at a housing development being built for Insular for petitioner Levitt & Sons of Puerto Rico, Inc., in San Juan, Puerto Rico. Insular, carried public liability insurance with respondent Commercial Insurance Company of Newark, New Jersey.

Berrios brought suit against the manufacturer of the rope and also against Harnischfeger Corporation, the manufacturer of the crane. The latter brought a third party action against Levitt. Levitt, then, brought a third party action against Commercial. The basis of this complaint was a hold harmless running from Insular to Levitt, which Levitt alleged was covered by the liability insurance policy of Commercial.

The District Court held that all the parties had reached a settlement agreement under which each of the four defendants had agreed to pay $34,000 to the plaintiff. Both Levitt and Commercial filed a joint appeal before the First Circuit in which they vigorously challenged the settlement agreement because neither of its counsel had been present at the settlement conference held on February 18, 1977 when the alleged settlement was reached. See *Berrios Rivera* v. *British Ropes, Ltd.*, 575 F. 2d 966, 968 (C.A. 1, 1978).

The Court of Appeals thought otherwise, and held that, as a matter of fact, the settlement agreement had been reached, and remanded the case to the district court so that the rights of Commercial and Levitt between each other would be decided there.

Commercial filed a "Counter Complaint" (Appendix D) against Levitt & Sons of Puerto Rico in which it alleged that an agreement was reached "in chambers before Hon. James T. Watson" to the effect that "if Commercial was successful in its

defense against the claim of Levitt, then Levitt would reimburse Commercial for the aforesaid sum of $34,000 plus interest that it pays". Levitt promptly filed its answer denying said pleading as "completely groundless". (Appendix E).

The controversy as to the last issue was, thus, framed through formal pleadings. No evidence was offered to the trial court by the parties as to this point in conflict. In spite of this fact the District Court entered judgment in favor of Commercial, holding that as a matter of fact Commercial and Levitt had reached a "winner-take-all" agreement. The Court of Appeals affirmed. A motion for rehearing (Appendix F) was duly filed raising this point in issue, but was denied. This petition for certiorari followed.